be prohibited unless structural separation is maintained.

III. THE ANTICONSUMER AND ANTICOMPETITIVE COSTS OF STRUCTURAL INTEGRATION HAVE INCREASED SIGNIFICANTLY SINCE THE COMPUTER III REMAND PROCEEDING

A. Introduction

Not only are there no significant public benefits to be derived from the elimination of structural separation, but the anticonsumer and anticompetitive risks of such a shift have also increased markedly since Computer III and the Computer III Remand proceeding. In Computer III, the Commission promised that its CEI/ONA rules and cost allocation rules would protect against access discrimination and cross-subsidies. In the Computer III Remand proceeding, faced with a massive record of egregious access discrimination under approved CEI plans and cross-subsidies under the cost allocation rules, the Commission promised that once ONA was fully in place, access discrimination would cease, that the strengthened cost accounting rules would control cross-subsidization and that price cap regulation would suppress incentives to cross-subsidize.[72]

Now, faced with the California II[73] and California III findings as to the inadequacy of ONA, relative to the Commission's original vision of ONA, the Further Notice suggests that the unbundling that has occurred pursuant to Section 251 of

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[72] 6 FCC Rcd at 7591-97, 7599-01, 7623 & n.211.

[73] California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

the Act may have alleviated the concerns that ONA was originally intended to address. The Further Notice also suggests that the local service competition facilitated by the Expanded Interconnection rules allows ISPs to obtain more of the network services they need free of BOC access discrimination. Finally, the Further Notice suggests that the development of intense competition in the information services industry also diminishes the threat of access discrimination and requests comment on these issues.[74]

Although Section 251 has partially accomplished the unbundling originally expected of ONA, such unbundling has not developed to the point where the risk of access discrimination has diminished sufficiently to dispense with structural separation. Even in the case of a network element that has been designated by the Commission as an unbundled network element (UNE) that must be made available upon request, BOCs can still undermine carriers' rights to such UNEs and have done so. Moreover, ONA, which is as moribund as it was at the time of the Computer III Remand proceeding and California III, together with the other antidiscrimination regulations, cannot come close to providing the additional protection necessary to justify the elimination of structural separation.

As discussed below, BOC discrimination and other anticompetitive conduct has continued, irrespective of ONA and

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[74] Further Notice at ¶¶ 29-36.

Section 251. Since the Commission does not propose any significant expansion of the inventory of unbundled network elements or other aspects of the Section 251 unbundling implemented in the Local Competition Order, and since ONA is not going to make any difference in its current state or the foreseeable future, there is no reason to expect that BOC anticompetitive conduct will abate or can be controlled any better than it was previously or is now. Neither Section 251 unbundling nor ONA and the other nondiscrimination safeguards can therefore serve as a predicate for the elimination of structural separation.

Furthermore, as will be explained, the other factors mentioned in the Further Notice -- the Expanded Interconnection proceeding and increased competition in the information services market -- provide no additional protection at all.[75] Indeed, since competitive abuses typically occur at the boundaries between monopoly and competitive service markets, the emergence of competitive markets adjacent to and dependent upon the BOCs' local exchange bottleneck only increases the BOCs' opportunities to discriminate and cross-subsidize.

Finally, although the strengthened cost accounting rules and price cap regulation were supposed to take care of improper cost-shifting, various recent federal and state audits have uncovered a wide variety of abuses since the advent of price cap

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[75] See Further Notice at ¶¶ 35-36.

regulation. The Further Notice did not focus on this subject, but the audit evidence rebutting the Commission's theories as to the effectiveness of its protections against cross-subsidies must be seriously considered if the Commission intends to conduct a rational cost-benefit analysis in this proceeding.[76] Given the increased risks of anticompetitive and anti-ratepayer abuses under the nonstructural regulations in the absence of structural separation, the structural separation requirement must be maintained.

B. ONA, Section 251 Unbundling, the Antidiscrimination Regulations and Other Factors Discussed in the Further Notice Are Not Sufficient to Control Discrimination and Other Anticompetitive Conduct by the BOCs

1. The Inadequacy of CEI

Although the Commission concedes that California III confirmed the inadequacy of ONA, it continues to insist that structural integration under CEI was upheld and provides protection against access discrimination.[77] As MCI explained in its prior comments in CC Docket No. 95-20, the Commission has never faced up to the implications of the MemoryCall Order and

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[76] The Commission may believe that its reliance on its safeguards against cross-subsidies has been upheld in California III and is therefore a settled issue. In fact, however, just as ONA was approved in California I, 905 F.2d at 1233, but rejected in California III as a basis for structural relief, 39 F.3d at 929-30, the safeguards against cross-subsidies cannot automatically be assumed to constitute a rational basis for structural relief in a new cost-benefit balance in light of a new record.

[77] Further Notice at ¶ 61.

the rest of the massive record of anticompetitive abuses presented in the Computer III Remand proceeding.

The Commission's continuing satisfaction with CEI ignores the fact that MemoryCall service was provided under a CEI plan that this Commission had found to comply with all of the CEI parameters, including equal access and price parity between ISPs and BellSouth's own MemoryCall service.[78] Moreover, in approving the BellSouth CEI plan, the Bureau explicitly "prohibit[ed] BellSouth from using CPNI to identify particular customers of existing VMS competitors for 'targeted' marketing efforts."[79] The MemoryCall Order subsequently found, however, that BellSouth was doing just that.

The Commission never explained in the Computer III Remand Order why conduct that the Commission conceded would violate the CEI rules and that occurred under an approved CEI plan (see 6 FCC Rcd at 7623 n.211) did not demonstrate that the CEI rules were ineffective. Such anticompetitive conduct under approved CEI plans demonstrates that CEI -- even in conjunction with all of the other antidiscrimination rules (nondiscrimination reports, network information disclosure rules and customer proprietary network information rules) -- is worthless as a substitute safeguard. Nothing in the Further Notice explains the

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[78] BellSouth Plan for Comparably Efficient Interconnection for Voice Messaging Services, 3 FCC Rcd 7284, 7285-90 (CCB 1988).

[79] Id. at 7293.

irrationality of reliance on CEI in light of MemoryCall. Now that California III has found that ONA will not add much to CEI and the other antidiscrimination rules, the Commission must finally face up to the implications of MemoryCall and other evidence of abuses.

2. The Unfulfilled Promise of ONA

The inadequacy of CEI/ONA to perform any more meaningful role now than it did when all of the previous discriminatory conduct was occurring is confirmed by various filings in CC Docket No. 95-20. Two documents previously filed with MCI's Comments on April 7, 1995 are a report by Hatfield Associates, Inc. entitled "ONA: A Promise Not Realized -- Reprise," submitted jointly by MCI, CompuServe and ITAA, and an affidavit by Peter P. Guggina, Director of Technical Standards Management for MCI. The Hatfield Report detailed the lack of development of ONA in recent years and the BOCs' resistance to the type of unbundling necessary for the satisfactory development of information services.

The 1995 Guggina Affidavit[80] explained in detail why ONA, or any unbundling or other technical issue referred to the Information Industry Liaison Committee (IILC), would never go anywhere. As Mr. Guggina explained, the IILC was essentially a black hole from which nothing ever emerged, or, if something did emerge, only years late and in a form that did not satisfy the

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[80] Tab C in the separate filing discussed above.

competitive needs that necessitated the request to the IILC in the first place. The BOCs simply used the IILC to slow roll whatever request for network features was presented to it by a competitive service provider.

A case in point discussed in the Guggina Affidavit was IILC issue #026 -- Long Term Unbundling and Network Evolution -- which was supposed to be the main vehicle for the resolution of ONA technical unbundling issues. Because of the ponderous, multi-layered review process that the BOCs imposed on the IILC, issue #026 had already taken four years when the Guggina Affidavit was submitted, and additional specifications remained to be developed. Moreover, the BOCs raised numerous policy issues in connection with issue #026 that caused further delay. Issue #026 was sliced into various sub-issues, all of which had to be referred to standards committees and related industry fora for still further development.

The Hatfield Report[81] also explained why the other proceedings mentioned in the initial Notice in CC Docket No. 95-20 and the state of competition in information services are irrelevant. The unbundling in the Expanded Interconnection proceeding is not the type of unbundling that is of any use to ISPs. Ironically, as the Hatfield Report also explained, since information services competition does nothing to loosen the BOC bottleneck in local exchange service, such competition makes the

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[81] To be submitted separately as Tab D.

information services market more vulnerable, not less vulnerable, to abuse by the monopoly BOCs. Finally, the Hatfield Report explains why fully separate subsidiaries more effectively protect against cross-subsidies and discrimination than do nonstructural regulations.

In response to BOC attempts to defend ONA and the IILC processes, MCI submitted rebuttal affidavits by Mr. Guggina and three of his colleagues providing further detail as to various aspects of the continuing failure of the IILC and other industry technical standards bodies to bring about the unbundling necessary to thwart discrimination. Those affidavits were filed with an ex parte cover letter dated April 25, 1996 in CC Docket No. 95-20, which also discussed various audits of the ILECs finding violations of the Commission's cost accounting rules, even under price cap regulation. The 1996 ex parte and its attachments will be resubmitted for the Commission's convenience.[82]

It is now almost three years after the original Guggina Affidavit and almost two years after the follow-up affidavits, and the passage of time has only confirmed the conclusion that the IILC was useless as a vehicle to bring about the unbundling needed by ISPs and competitive carriers. In the most recent affidavit by Mr. Guggina on this subject, attached hereto as

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[82] The 1996 ex parte letter and its attached affidavits will be submitted together as Tab E.

Appendix A, he discusses the substitution of the NIIF for the ineffectual IILC and the similar uselessness the NIIF in bringing about necessary unbundling to date. Issue #026, after three more years of discussion, was finally closed out with the issuance of a report by the IILC before it was terminated, and the NIIF is now addressing issues derived from issue #026, all without any actual unbundling.

The committee label is irrelevant; industry technical standards fora cannot be relied upon to bring about fundamental changes that threaten the monopoly position of the ILECs in the absence of strict, detailed mandates from the Commission, which have not been forthcoming in the area of ONA. Since fundamental unbundling poses such a threat, the BOCs and other ILECs will never agree to such unbundling in voluntary fora such as the NIIF. The Commission therefore must provide the specific directions to the BOCs and other ILECs that are necessary to force fundamental unbundling, leaving only the details of implementation to industry technical bodies. Otherwise, the BOCs will continue to sabotage the goals of ONA in these fora, just as they have delayed nondiscriminatory access to Operations Support Systems (OSS), required for the development of local competition.[83]

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[83] See, e.g., Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina, CC Docket No. 97-208, FCC 97-418 (released Dec. 24, 1997), at ¶¶ 88-211.

3. The Continuing BOC Abuses

If there were any doubts about the BOCs' continuing monopoly power in local exchange service and their propensities to abuse that power in adjacent competitive markets, the history of discrimination and other anticompetitive conduct since the Computer III Remand proceeding should erase any such doubts. In addition to the run-around to which MCI and others have been subjected in their pursuit of unbundled network features, as detailed in the affidavits discussed above, and the abuses described in the ATSI letter, MCI provided a typical sample of BOC anticompetitive abuses in its 1995 Comments, the relevant portion of which will be resubmitted for the Commission's convenience.[84]

More recently, MCI was forced to file a formal complaint against Bell Atlantic on account of its provision of reverse directory assistance, an information service, on an unseparated basis in the absence of a CEI plan.[85] Bell Atlantic refuses to make available to MCI the directory listings that it uses to provide such service, even though directory assistance databases constitute UNEs subject to the Section 251 requirements.[86] Bell

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[84] Tab F.

[85] See MCI Telecommunications Corp. and MCImetro Access Transmission Services, Inc. v. Bell Atlantic Corp., File No. 98- (filed March 17, 1998).

[86] See Local Competition Order at ¶ 538. Moreover, MCI believes that Bell Atlantic is providing this service on an interLATA basis throughout the state of New Jersey and that its

Atlantic's multiple violations demonstrate that CEI is not self-enforcing; Bell Atlantic has apparently been providing this information service for two years on an unseparated basis without ever having filed a CEI plan.

4. Section 251 Unbundling Has Not Achieved the Antidiscrimination Goals of ONA

Section 251 has not ameliorated this anticompetitive behavior. Although the Local Competition Order set forth in some detail the specifications implementing the unbundling requirements of Section 251, the Eighth Circuit (incorrectly) removed the Commission's authority over the pricing of unbundled network elements (UNEs) for Section 251 purposes.[87] The BOCs have accordingly focused their efforts in this area on developing non-cost-based pricing of UNEs, which then has to be negotiated, arbitrated and litigated in every state. Attached as Appendix B is a letter from Jonathan B. Sallet, Chief Policy Council for MCI, to former Commission Chairman Reed Hundt, dated October 22, 1997, detailing the BOCs' successful obstructionism of the pro-competitive policies of Sections 251 and 252 of the Act.

As explained in that letter, the BOCs have continued to engage in anticompetitive behavior since the filing of MCI's Comments and the other documents discussed above and the passage

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refusal to make its directory listings available to MCI therefore violates the nondiscrimination requirements of Section 272 as well.

[87] Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997)(subsequent history omitted).

of the 1996 Act. For example, in January 1997, Bell Atlantic proposed an NRC of $74.88 to order an unbundled network loop, while Bell Atlantic charges a new residential customer only $55 to sign up for local service. That difference would not only exploit consumers but also would allow Bell Atlantic to subject competitors to a price squeeze.[88] Even more egregious are Pacific Bell's NRCs of $247.25 (plus $162.60 for disconnection, for a total of $409.85) for an unbundled loop and port and $272.29 (plus $176.69 for disconnection, for a total of $448.98) for a basic cross connect and unbundled loop,[89] while it charges its own new residential and business customers only $34.75 and $70.75, respectively, to establish service.[90]

The BOCs also undermine the unbundling requirements of Section 251 through inadequate systems for the ordering, provisioning, maintenance and repair and billing of UNEs. The BOCs have failed to meet the January 1, 1997 deadline set in the Local Competition Order to implement nondiscriminatory access to their Operations Support Systems (OSS),[91] which is as crucial a

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[88] Appendix B hereto at 3-4, 10-11.

[89] These charges are contained in MCI's Interconnection Agreement with Pacific Bell at Attachment 8 - Appendix A, pages 1 and 3.

[90] See Pacific Bell Network and Exchange Services Tariff, Schedule Cal. P.U.C. A3.2.2.A and A3.1.2.A.

[91] See, e.g., Appendix B hereto at 11.

prerequisite for Section 251 unbundling as it is for ONA.[92] Bell Atlantic, for example, is still unable to process MCI's orders in an automated manner.[93]

Even under the best of circumstances, Section 251 cannot be counted on to cure the ills of ONA for other reasons as well. Section 251 does not focus on the type of logical, software-driven unbundling that ONA was supposed to provide. As the Further Notice points out, Section 251 provides more of a physical unbundling of pieces of the local network, much in the same manner as the physical unbundling that has been carried out in the Expanded Interconnection proceeding. Such unbundling is useful for a competitive entity carrying a large volume of traffic that could be concentrated along the path sought to be displaced. It is less useful, however, for an ISP needing a wide range of switching capabilities made available by the BOC to all of the ISP's customers. Such capabilities were supposed to have been made available under ONA, but the BOCs have steadfastly refused to provide the type of access to their switches that would allow ISPs to develop and deliver information services as they see fit.

Moreover, a carrier may not simply request an UNE under

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[92] See Local Competition Order at ¶ 525 (ILECs must provide, upon request, nondiscriminatory access to OSS for pre-ordering, ordering, provisioning, maintenance and repair and billing of UNEs no later than January 1, 1997).

[93] Id. at 11-13.

Section 251; ILECs are required by Section 251(c)(3) to provide UNEs to requesting carriers "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement [that must be negotiated to fulfill the duties described in Section 251(c)] and the requirements of this section and section 252." To the extent that a new UNE is needed, the Section 251/252 agreement process is fairly ponderous and subject to lengthy delays over details of the terms and conditions, especially price, under which UNEs will be provided. Most of the interconnection agreements between CLECs and ILECs have been negotiated, and negotiations would have to be reopened to incorporate any additional UNEs identified by the Commission. Prices for UNEs have typically been subject to arbitration and judicial review, slowing down the process even further.

Finally, as the complaint against Bell Atlantic demonstrates, Section 251 is not self-enforcing and is therefore not the panacea for BOC discrimination that the Further Notice suggests. Nothing could be clearer than that requesting carriers have a right to nondiscriminatory access to ILEC directory assistance databases as an unbundled UNE,[94] but Bell Atlantic refuses such access.

5. Nonstructural Safeguards Are Inadequate to Prevent BOC Discrimination Against Other ISPs

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[94] See Local Competition Order at ¶ 538.

These recent developments show that as competition encroaches into markets previously considered to be the preserve of the BOCs, they can be counted on to fight an increasingly desperate rear-guard action to delay the loosening of the local exchange bottleneck. Using a variety of strategies, they have leveraged their remaining monopoly power to extort whatever advantage they can secure in adjacent competitive markets, including the information services market, and to forestall the emergence of competition in local services as long as possible.

It can only be concluded that, in the absence of structural separation, the BOCs will continue to discriminate against other ISPs in the provision of access, in marketing and in other ways. CEI, what remains of ONA and the other antidiscrimination rules therefore cannot be considered a rational substitute for structural separation. Given the BOCs' undermining of Section 251 unbundling, that factor is not going to add sufficient protection to make a significant difference in the foreseeable future.

In light of the BOCs' continuing anticompetitive conduct against ISPs under structural integration, it is clear that structural separation must be retained. That requirement makes it much more possible to deal effectively with a BOC's ability to manipulate the availability, installation, maintenance, repair and quality of network features and access services. By requiring a separate BOC information service affiliate to acquire

the BOC's access services on the same basis as competing ISPs, structural separation not only helps to ensure non-discriminatory access to the BOC's local exchange network, but it also promotes cost-based pricing.

By requiring that joint marketing only be permitted where the separate subsidiary is reselling the BOC's local services and is marketing them with its own information service, structural separation also inhibits unhooking and other types of misuse of customer information and improper tying of local exchange and information services. The requirement of a separate affiliate also provides greater certainty that network information will be disclosed in a timely and non-discriminatory manner to all users. Moreover, structural separation makes it easier for employees working on the local exchange side of a BOC's business to deal with their fellow employees in the BOC's information services business on an arm's length basis -- the same as they would with any other customer -- by physically separating the carrier's local exchange and information services operations. By making transactions between different operations more visible, structural separation reduces the risk that anticompetitive arrangements between affiliates will go undetected.

C. The Cost Accounting Rules Do Not Prevent Cross-Subsidies

Although the Further Notice is relatively silent on the other half of the nonstructural regulations -- the cost accounting rules -- their effectiveness must be considered in any

rational cost-benefit analysis of a policy shift from structural separation to structural integration under nonstructural safeguards. Assuming, as must be the case, that the cost allocation rules and other accounting regulations are still part of the regulations being substituted for structural separation, they must be an element in the balance.

As in the case of discrimination and other anticompetitive conduct, much of the cost shifting that occurs in connection with the provision of BOC information services relates to the intrastate aspects of the affected information services. To the extent that BOC information services are offered on an intrastate basis, the cost shifting and misallocation opportunities that are presented thereby will largely affect intrastate costs. At the same time, this Commission, which has removed the protection of structural separation, cannot provide any other regulatory protection against intrastate cross-subsidies.

In its 1995 Comments, MCI cited several examples of intrastate as well as interstate cross-subsidies uncovered by federal and state audits, including a California PUC audit that found that state ratepayers had subsidized Pacific Bell's development of its voice messaging and other information services. The relevant portion of that discussion will be resubmitted for the Commission's convenience.[95] Additional

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[95] Tab G in the separate submission.

examples were cited in the April 25, 1996 ex parte letter.[96]

A number of these cross-subsidies took place under price cap regulation, showing that such regulation has not removed the incentive to misallocate costs and cross-subsidize. Moreover, price cap regulation of interstate rates cannot have any impact on intrastate cross-subsidies, which are probably more significant for most ISPs. As the ex parte also explains, cost accounting rules do not work because there is no effective deterrent to violations. If and when a violation happens to be uncovered by an audit years later, the competitive and ratepayer injuries have long since occurred, and, after a refund is ordered, the BOC is no worse off than if it had never violated the rules.

Since the filing of the 1996 ex parte letter, two additional audits have come to light. The first was a joint federal-state audit of Southwestern Bell Telephone Company (SWBT), which found that SWBT and its affiliates engaged in accounting practices inconsistent with the Commission's rules, including practices with respect to the documentation of employee time charges. SWBT agreed to an exogenous price cap reduction as a result of the audit.[97] More recently, a joint federal-state audit of the investment recorded in the plant accounts of the GTE Telephone

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[96] Tab E in the separate submission.

[97] See Consent Decree Order, Southwestern Bell Tel. Co., AAD No. 95-32, FCC 97-9 (released Feb. 7, 1997).

Operating Companies concluded that of the items audited, 36% of the recorded value of GTE's plant was either missing or could not be verified.[98] Presumably, this is not a new development, which indicates that GTE's initial price cap rates, based on its rate base during rate-of-return regulation, may have been grossly inflated.

It should also be noted that the elimination of "sharing" in the current price cap plan does not ameliorate ILEC incentives or abilities to cross-subsidize, since the "low-end adjustment" and periodic reviews of earnings under price cap regulation generate sufficient rate-of-return incentives to induce such behavior. Just as the advent of price cap regulation in 1990 did not end cost misallocations and cross-subsidization, as had been hoped, these recent modifications of price cap regulation still leave enough rate-of-return incentives to motivate such evasive conduct.

Even more importantly, however, as long as interstate access rates are artificially inflated, -- as the Commission conceded they are in the Access Reform Order[99] --the BOCs will always have

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[98] Commission Releases Federal/State Joint Audit Report of GTE, Report No. CC 98-6 (released March 18, 1998). See also, Memorandum Opinion and Order, GTE Telephone Operating Companies Release of Information Obtained During Joint Audit, AAD 98-26, FCC 98-34 (released March 18, 1998).

[99] See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers, et al., 62 Fed. Reg. 31868, 31876 (June 11, 1997)(conceding that required access charge reductions will not drive rates down to competitive levels).

a subsidy pool to fund competitive services. Thus, there will be no need to raise access charges to subsidize information services, as in the classic cross-subsidization scenario. They are already grossly inflated. Because the caps are so high, price cap regulation is therefore irrelevant to the problem of cross-subsidies.

Given the evident weaknesses of cost allocation rules as a safeguard against cross-subsidies, after so many years of tinkering by the Commission, and the irrelevance of such rules to the inherent subsidization of any joint BOC activities by inflated access charges, it would be irrational to eliminate the structural separation requirement. Such separation ameliorates the problem of cross-subsidization by eliminating some joint and common costs and the opportunities for arbitrary misallocation of those costs. Structural separation also highlights transactions between affiliates, thereby inhibiting cost shifting.

Structural separation also provides state commissions with a powerful tool to control intrastate cross-subsidies, an especially difficult task when dealing with multi-state RBOCs. Given the Commission's chronically inadequate auditing and enforcement resources, the largely self-enforcing structural separation requirement is a more realistic safeguard than accounting rules and enforcement against cross-subsidies.

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Although, as the Further Notice points out, Congress'

decision in Section 272 to impose a separation requirement on BOC interLATA information services is not binding on the Commission in considering whether to eliminate structural separation for BOC local information services, Congress' balancing of the costs and benefits is clearly another significant factor supporting the continuation of structural separation. Independently of all of the costs and benefits discussed above, the Commission will also need to review whether the cost-benefit balance for local and intraLATA information services is so different from the balance for interLATA information services that a different outcome from the balance struck in Section 272 is rational.

It is difficult to imagine that such a finding could be made, given the parallel nature of the relevant costs and benefits of structural separation for both categories of information services. Indeed, if anything, the case for eliminating structural separation is even weaker for local and intraLATA information services than it is for interLATA information services, since the former will also likely carry with it preemption of inconsistent state regulations, thus depriving the state commissions of another tool for the control of discrimination and cross-subsidization in local and intrastate services. MCI should also point out, on a related matter, that, because of the parallel nature of the restrictions in Section 272 and the Computer II structural separation rules, provision of an intraLATA information service through a Section 272 affiliate

should satisfy the structural separation requirement.

IV. THE COMMISSION SHOULD UNDERTAKE ADDITIONAL UNBUNDLING AND OTHER STEPS TO COMBAT DISCRIMINATION

Whether or not the Commission ultimately decides to eliminate structural separation, it should at least continue the implementation of the unbundling requirements of Section 251 that it started in the Local Competition Order and order the fundamental unbundling in ONA that was originally promised in Computer III. As the recent complaint against Bell Atlantic demonstrates, BOC recalcitrance in meeting unbundling and nondiscrimination obligations remains strong, even where those obligations have already been spelled out by the Commission in detail.

A. The Unbundling Obligations in Section 251 Should be Enforced by Prohibiting ILECs' Use of UNEs Not Made Available to Other Carriers

Under Section 251, as implemented in the Local Competition Order, the BOCs and other ILECs must provide access to the UNEs specified in that Order, including directory assistance databases, to any requesting carrier. Moreover, the ILECs may not place any restrictions on the services to be provided using UNEs.[100] As discussed above, however, rights under Section 251 can be undermined by various means, including the unreasonable pricing of UNEs.

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[100] See Local Competition Order at ¶¶ 264, 292.

One step that the Commission could take to enforce unbundling rights under Section 251 in a way that would assist ISPs would be to prohibit an ILEC from using a particular UNE in the provision of its own information services if the terms and conditions of the provision of that UNE to other carriers have not yet been negotiated and the UNE actually made available to them. Typically, ILECs are not under much pressure to take a reasonable posture in the negotiations over the price and other terms and conditions for access to UNEs. CLECs need the UNEs, but ILECs do not face any competitive pressures to meet that demand. As a result, ILECs have a tremendous advantage in the negotiations, especially as to price.

If an ILEC were prohibited from using a particular UNE, such as directory databases, in the provision of its own information services until the UNE is actually made available to all requesting carriers, the requesting carriers would have some leverage in those negotiations, somewhat evening up the bargaining positions. Without such an incentive, ILECs will remain unmotivated to comply with carrier requests for UNEs. A prohibition on an ILEC's use of a UNE that has not been made available to others would provide some market pressure on ILECs to satisfy the demand for UNEs that is otherwise lacking. At the same time, as discussed in more detail below, CLECs will face competitive pressures to resell such UNEs to ISPs, thereby meeting their needs at reasonable prices.

B. ONA Must Be Made to Work

As discussed above, Section 251 unbundling cannot fully alleviate all of the problems that the Commission originally hoped to address through ONA, since they involve different types of unbundling. ONA must therefore be made to work for the "traditional" information services for which it was originally intended, and it must be expanded to cover the types of unbundling issues raised by the emerging broadband packet-switched information services. As to the first point, as Mr. Guggina points out in his attached affidavit, the Commission can no longer simply delegate technical unbundling issues to industry fora, such as the NIIF, and expect that a solution will emerge. Any issue, no matter how technical in appearance, that threatens the ILEC local monopoly is never just a technical issue, and the Commission must impose overall outcomes and strict deadlines on such issues if they are ever to be resolved. As Mr. Guggina explains, the industry has been discussing long term unbundling, first at the IILC and then at the NIIF, for seven years, with nothing to show for it but a large collection of theoretical technical papers.

Accordingly, the Commission should now order what it should have ordered in Computer III -- namely, fundamental physical and logical unbundling of the local network, to be accomplished by a date certain, with intermediate checkpoints. At this late date, the end of the decade should be enough time to accomplish the

original goal of Computer III. One prerequisite, however, is a regulatory mandate. Such unbundling, if it were required by a date certain and carried out, would not only facilitate competition in information services, but it would also hasten the development of local service competition and lay the groundwork for BOC entry into long distance service. The Commission should not miss this opportunity to bring about a change that would be so beneficial to so many sectors of the telecommunications industry.

C. The Commission Should Require the Unbundling That is Necessary for the Emerging Broadband Packet-Switched Services

In ordering the fundamental unbundling of the local network that was supposed to have been accomplished in Computer III, the Commission should also expand ONA to cover the unbundling that is needed for participation in broadband packet-switched information services. These services typically do not make use of the ILEC's local circuit switching, unlike more traditional information services. The unbundling that these newer services need is more akin to the physical unbundling required by Section 251. Whether undertaken under the rubric of ONA or Section 251, what is necessary is for the ILECs to be required to make the underlying broadband telecommunications services available to others on a nondiscriminatory basis so that they can provide the same information services that the BOCs provide.

One element that is needed for the provision of the new